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HECNY SHIPPING LTD.

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10
11 CLEVO CO., a Taiwan corporation,

12 Plaintiff,

13 vs.
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15 HECNY SHIPPING LTD., a Hong
16 Kong corporation; HECNY GROUP,
17 MANAUS-AM, BRASIL and
18 HECNY TRANSPORTATION,
INC., a California corporation

19 Defendants.
20

Case No.: 2:09-cv-09135 MMM(MAN)

Honorable Margaret M. Morrow

**DEFENDANT HECNY SHIPPING
LTD.'S NOTICE OF MOTION AND
MOTION TO DISMISS FIRST
AMENDED COMPLAINT UNDER
FEDERAL RULE 12(b)(5) FOR
INSUFFICIENT SERVICE OF
PROCESS; MEMORADUM OF
POINTS AND AUTHORITIES**

Date: September 27, 2010

Time: 10:00 a.m.

Courtroom: 780

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23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

24
25 PLEASE TAKE NOTICE that on September 27, 2010 at 10:00 a.m., or as
26 soon thereafter as the matter may be heard, in Courtroom 780 of the above-entitled
27 Court, located at 255 E. Temple St., Los Angeles, CA 90012, Defendant Hecny
28

1 Shipping Ltd. ("HSL") will move this Court to dismiss the First Amended
2 Complaint as to HSL for insufficient service of process pursuant to Rule 12(b)(5)
3 of the Federal Rules of Civil Procedure and this Court's Order to Continue
4 Scheduling Conference dated April 23, 2010. This Motion is made following the
5 conference of counsel pursuant to Local Rule 7-3 which took place on July 27,
6 2010.
7
8

9 This Motion is based on this Notice of Motion, the Memorandum of Points
10 and Authorities attached hereto, the Declarations of B. Alexander Moghaddam and
11 Bruce Chen filed concurrently herewith, and such other and further evidence as
12 may be presented prior to the hearing on the motion.
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15
16 Dated: August 2, 2010

LAW OFFICES OF ALEXANDER
MOGHADDAM, PC

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19 By: /B. Alexander Moghaddam/
20 B. ALEXANDER MOGHADDAM
21 Attorneys for Defendant HECNY
22 SHIPPING LTD.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff Clevo Co. (“Clevo”) has failed to properly serve a Summons and the First Amended Complaint on HSL. Although Clevo has filed a Certificate of Service and a Proof of Service purporting to have sent by FedEx the Summons and First Amended Complaint to “Charlie C.K. Lee, President and Chairman of the Board” of HSL and to have delivered the same to Mr. Lee at HSL’s offices in Hong Kong on July 12, 2010, such delivery did not, in fact, occur. The Summons and First Amended Complaint (1) were not delivered by FedEx to Mr. Lee - or to anyone else - at the address indicated in the Proof of Service and (2) Mr. Lee does not have an office at that address and is not the President or Chairman of HSL and is not, and was not, otherwise authorized to accept service for HSL on July 12, 2010.

The Court in its Order to Continue Scheduling Conference dated April 23, 2010, ordered that, if Plaintiff failed to serve HSL by July 12, 2010, the court would dismiss HSL from the case. Accordingly, the First Amended Complaint as against HSL must now be dismissed.

II. STATEMENT OF FACTS.

Plaintiff and Defendant Hecny Transportation, Inc. (a California Corporation and separate company from HSL) filed a stipulation with the court on April 23, 2010, requesting a continuance of the initial Scheduling Conference date of May 3, 2010, to July 12, 2010, to give Plaintiff more time to attempt to serve HSL. On the same day the stipulation was filed, the Court granted the stipulation and ordered that, “[i]f service is not effected by July 12, 2010, the court will dismiss the unserved defendant without prejudice and proceed with the action.” (Declaration of

1 B. Alexander Moghaddam ¶2 and Ex. “1” thereto; Court Docs. 14 & 15)
 2 (Emphasis added.)

3 On July 16, 2010, Clevo filed a Certificate of Service and a Proof of Service,
 4 representing to the Court that, on July 8, 2010, Clevo sent a FedEx package
 5 containing, among other things, a Summons and the Amended Complaint and that
 6 the package was “delivered July 12, 2010 at 12:07 p.m.” to:

7 “Charlie C.K. Lee, President and Chairman of the Board
 8 Hecny Shipping LTD
 111 Wai Yip St., 11/F, Kwun Tong, HK 05000”

9 (Moghaddam Declaration ¶3 and Ex. “2” thereto; Court Doc. #20).

10 The Proof of Service is inaccurate on several grounds, and proper service
 11 has not been effected on HSL. First, Charlie C.K. Lee is not, and was not on July
 12 12, 2010, either the President or Chairman of HSL. He does not, and did not on
 13 July 12, 2010, have an office at the address indicated in the Proof of Service. Mr.
 14 Lee is a shareholder and non-executive director, but was not, in any event,
 15 authorized to accept service on behalf of HSL on July 12, 2010. (Declaration of
 16 Bruce Chen ¶4.)

17 Second, the Summons and First Amended Complaint were not delivered by
 18 FedEx on July 12, 2010, and have not since been delivered by FedEx or any other
 19 courier service, to anyone at the address indicated in the Proof of Service.¹ (Chen
 20 Decl. ¶3.)

21 Third, HSL’s registered offices in Hong Kong are on the tenth floor of the
 22 building at the address indicated in the Proof of Service. (Chen Decl., ¶2.)

23 Finally, and notably, Plaintiff did not attach a declaration by anyone with
 24 personal knowledge of any actual delivery by any courier, or any executed receipt
 25 of actual delivery by any courier, to the Certificate of Service or Proof of Service.
 26

27 ¹ The FedEx messenger apparently instead delivered the package to an employee of
 28 a warehouse, a company called Hecny Transportation Limited, located on the
 ground floor of the building.

1 Instead, these documents include only the declarations of Sissel Browder, a
 2 paralegal at the Menlo Park, California, office of Plaintiff's counsel, who, HSL
 3 respectfully submits, likely has no personal knowledge of what did or did not occur
 4 in Hong Kong on the pertinent dates.²

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 6 **III. THE PURPORTED SERVICE OF PROCESS WAS INSUFFICIENT**
 7 **AND THE FIRST AMENDED COMPLAINT SHOULD BE**
 8 **DISMISSED AS AGAINST HSL**

9 It is fundamental that "[b]efore a federal court may exercise personal
 10 jurisdiction over a defendant, the procedural requirement of service of summons
 11 must be satisfied." *Omni Capital Int'l., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97,
 12 104 (1987), *superseded by statute on other grounds*, Futures Trading Practices Act
 13 of 1992, Pub.L. No. 102-546, § 211, 106 Stat. 3590, 3607-08 (1992). "Neither
 14 actual notice, nor simply naming the person in the caption of the complaint, will
 15 subject defendants to personal jurisdiction if service was not made in substantial
 16 compliance with Rule 4." *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir.
 17 1982) (internal citations omitted). Once service of process is challenged, the

18 ² Defendant HSL notes that, on Tuesday, July 27, 2010 the parties agreed to treat
 19 Monday, August 2, 2010, as the last day for HSL to respond to the First Amended
 20 Complaint, assuming proper service had been effected on July 12, 2010. On the
 21 same day, HSL requested, by e-mail, a one-week extension for the response to the
 22 First Amended Complaint, from August 2 to August 9, 2010. Counsel for Clevo
 23 initially responded by refusing to grant an extension without HSL's agreement to
 24 waive any motion challenging service. Later that day, counsel for Clevo agreed to
 25 the requested extension, after being informed, by telephone, that HSL was in fact
 26 considering a motion to dismiss for insufficient service of process under Rule
 27 12(b)(5) and that, indeed, HSL would be more likely to file such a motion if it
 28 were compelled to file a response by August 2. It was agreed that HSL's attorney
 would send Clevo's counsel a stipulation on the extension on July 29, 2010. The
 stipulation was e-mailed to counsel for Clevo at about 1:00 p.m. on July 29, and at
 about 6:00 p.m. of the same day Clevo's counsel advised that she would not sign
 the stipulation. (Moghaddam Decl. ¶¶ 4-9 and Exhibits 3-9 thereto.) Counsel for
 the parties also had at least two telephone conversations on July 27 regarding the
 bases for a motion to dismiss for insufficient service and possible resolutions.
 (Moghaddam Decl. ¶ 6 and Exh. 4 thereto.)

1 plaintiff bears the burden of establishing that service was valid. *Brockmeyer v.*
 2 *May*, 383 F.3d 798, 801 (9th Cir. 2004).

3 **A. Evidence Adduced in Support of This Motion Rebutts Plaintiff's**
 4 **Purported Proof of Service, And Plaintiff's Proof of Service Is**
 5 **Also Insufficient For Lack of Any Declaration Based Upon**
 6 **Personal Knowledge of Actual Delivery.**

7 A signed return of service ordinarily constitutes prima facie evidence of
 8 valid service. *See S.E.C. v. Internet Solutions for Business Inc.*, 509 F.3d 1161,
 9 1166 (9th Cir. 2007). This principle does not assist Plaintiff in this case, however,
 10 for at least two reasons.

11 First, any prima facie showing of service is rebuttable. *Blair v. City of*
 12 *Worcester*, 522 F.3d 105, 112 (1st Cir. 2008) (“the defendants effectively rebutted
 13 any presumption that might have arisen from the returns of service” and “the
 14 ultimate burden of proving proper service returned to the plaintiffs”). In the
 15 present case, the Summons and First Amended Complaint were not served upon
 16 HSL as represented in the Proof of Service. The Summons and First Amended
 17 Complaint were not delivered by FedEx to HSL's offices on July 12, 2010.

18 Second, as discussed above, Plaintiff has not submitted any declaration by
 19 any person with knowledge of what did or did not occur in Hong Kong. Neither
 20 the Certificate of Service nor the Proof of Service is valid evidence – prima facie
 21 or otherwise – that any courier in fact delivered the papers to HSL in Hong Kong.
 22 Fed. R. Evid. 602 (“A witness may not testify to a matter unless evidence is
 23 introduced sufficient to support a finding that the witness has personal knowledge
 24 of the matter.”).

25 **B. Plaintiff Has Not Complied With Rule 4.**

26 No part of Rule 4 affirmatively authorizes service by “courier” – which is
 27 the only purported method of service claimed in the Certificate of Service and
 28 Proof of Service. *See Brockmeyer*, 383 F.3d at 800 (“For service by international

1 mail to be effective in federal court, it must ... be affirmatively authorized by some
 2 provision in federal law.”). Although it is not clear which provision of Rule 4 the
 3 Plaintiff might purport to rely upon, it is clear that Plaintiff cannot rely on Rule
 4 4(f)(2)(C)(ii), which in some circumstances, “unless prohibited by the foreign
 5 country’s law,” allows service “by using any form of mail that the clerk addresses
 6 and sends to the individual and that requires a signed receipt.” Fed. R. Civ. Proc.
 7 4(f)(2)(C)(ii). “This rule authorizes service abroad by mail for which a signed
 8 receipt is required, when such mail is addressed and mailed by the clerk of the
 9 federal district court in which the suit is filed.” *Brockmeyer*, 383 F.3d at 804.
 10 None of the requirements of Rule 4(f)(2)(C)(ii) has been satisfied here.

11 First, there is authority that delivery by Federal Express is not “mail” for
 12 purposes of Rule 4.³ *See Audio Enterprises, Inc. v. B. & W Loudspeakers*, 957
 13 F.2d 406, 409 (7th Cir. 1992) (complaint should have been dismissed for
 14 insufficiency of service of process where summons and complaint were sent to
 15 defendant by Federal Express), *cited with favor in Magnuson v. Video Yesteryear*,
 16 85 F.3d 1424, 1430 (9th Cir. 1996) (holding “that Federal Express does not satisfy
 17 the requirements of Rule 5(b)”). Second, neither the Certificate of Service nor the
 18 Proof of Service indicates that the clerk of the Court was involved in the purported
 19 service by courier. *See Brockmeyer*, 383 F.3d at 809 (service by international mail
 20 that did not involve court clerk was insufficient). Third, Plaintiff has not submitted
 21 any courier’s receipt signed by any authorized representative of HSL, as required
 22 by Rule 4(l)(2)(B). Fed. R. Civ. Proc. 4(l)(2)(B) (proof of service under Rule

23
 24 ³ One District Court in the Ninth Circuit has observed that the Courts are not in
 25 agreement on whether Federal Express constitutes “mail.” *See Power Integrations,*
 26 *Inc. v. System General Corp.*, 2004 WL 2806168 *2 n. 3 (N.D. Cal. 2004). The
 27 Plaintiff in this case is not assisted by any case that has found (contrary to the
 28 appellate decisions cited in the text above) that FedEx is “mail,” because the
 Plaintiff has not complied with the other requirements of Rule 4(f)(2)(C)(ii) – *i.e.*,
 dispatch by the Court clerk, and proof of a receipt signed by an authorized agent of
 HSL. In *Power Integrations*, for example, it was undisputed that the defendant
 challenging service had “received and signed for the package dispatched by the
 Clerk of the Court.” *Id.* at * 1 and 3 n. 3. There is no such evidence in this case.

1 4(f)(2) must be proven by “a receipt signed by the addressee, or by other evidence
2 satisfying the court that the summons and complaint were delivered to the
3 addressee”); *SAT Intern. Corp. v. Great White Fleet (US) Ltd.*, 2006 A.M.C. 1108,
4 2006 WL 661042 * 16 (S.D.N.Y. 2006) (granting Rule 12(b)(5) motion to dismiss
5 where plaintiff “failed to file a receipt of service or any other proof of service ... as
6 required by Rule 4(l)”).

7 Therefore, pursuant to Rule 12(b)(5) and this court’s April 23,
8 2010, Order, the First Amended Complaint as against HSL must be dismissed.

9 **IV. CONCLUSION.**

10 For the foregoing reasons, Defendant HSL respectfully requests that the
11 instant motion be granted and the First Amended Complaint as against HSL be
12 dismissed without prejudice.

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14 Dated: August 2, 2010

LAW OFFICES OF ALEXANDER
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16
17 By: /B. Alexander Moghaddam/
B. ALEXANDER MOGHADDAM

18 Attorneys for Defendant HECNY
19 SHIPPING LTD.